

1 crossing, and Mr. Marcos was on the standing, instead
2 of being on the side of the car, he was standing on
3 the crossover platform above the knuckle, spread eagle
4 and a Freightways Corporation truck was going into the
5 plant and they collided at the crossing and Mr. Marcos
6 just, with his hand he went onto the front of the
7 truck and rolled down into a ditch claiming an
8 accident.

9 Q This was the case you mentioned earlier
10 involving a trucking company?

11 A Yes.

12 Q What was the Clark --

13 A Now, I want to tell you this, if this comes
14 up, this Marcos versus Freight, that was -- well,
15 Mr. Marcos and the conductor settled with Conrail and
16 General Motors for \$250,000 and then they persisted
17 in their design against Freightways Corporation, so.

18 Q What was the Clark case?

19 A The Clark case -- I told you that awhile
20 ago.

21 Q Okay.

22 A Burlington Northern case, Mr. Clark was
23 injured while handling a hand brake. That was in that
24 other.

25 Q Okay. Well, the case you told me about is

1 identified in the other sheet as Clark versus
2 Cavanaugh. And you also identify it as a case in
3 which you were deposed or testified in trial since
4 1997.

5 A Wait a minute. That's a different. That's
6 a different case there. That was a case where they,
7 this Mr. Clark --

8 Q Make sure we are talking about the same
9 case. You are referring now to the Clark versus
10 Cavanaugh case on the prior list?

11 A Yeah.

12 Q Marked as Westphal Deposition Exhibit 3?

13 A I'm sorry, there is two Clark cases.

14 Q Okay.

15 A The Clark was versus Cavanaugh. And
16 Cavanaugh was not a railroad per se, it was another
17 group, a company that was involved and he was involved
18 in the railroad accident. That was down in Alabama.

19 Q You told me that was a grade crossing case?

20 A I didn't. I thought that was the Clark
21 that was in the Burlington Northern case over here.

22 Q What is the Clark versus Burlington
23 Northern case?

24 A That's the one I referred to before that
25 had a bad hand brake and the hand brake locked up and

1 they had to finally take it off the car.

2 Q So that's an FELA case?

3 A Yes.

4 Q Back to Westphal Deposition Exhibit 8, I
5 had asked you what your first involvement was in this
6 case or when that occurred, and you referred to this
7 sheet and reference March 27th, 2006; correct?

8 A Yes.

9 Q Who contacted you?

10 A I was contacted by Mr. Tibor Solymosi.

11 Q What did Mr. Solymosi tell you when he
12 contacted you?

13 A He told me about the accident and that he
14 was going to send me materials and ask me to review
15 the facts and everything involving the incident that
16 occurred on April 27 and conduct any necessary
17 investigations and render an opinion regarding the
18 conduct Norfolk Southern Corporation and its
19 personnel.

20 Q What record do you have in your expert file
21 that identifies March 27, 2006 as the initial contact?

22 A Whenever a client calls me, I always type
23 up a folder and I put on that folder the date, the
24 first contact. And that's the date and that is always
25 on this folder.

1 Q On the tab on the folder?

2 A Yes.

3 Q So following that initial contact, did
4 Mr. Solymosi then send you written materials to
5 review?

6 A Yes, this material here (indicating).

7 Q Referring to the four three-ring binders?

8 A Yes.

9 Q Go back if you would, Mr. Westphal, to
10 Westphal Deposition Exhibit 6 which is your expert
11 report, and I'm looking at the bottom of page 1 called
12 documents and there are 26 items identified there?

13 A Yes.

14 Q Does that constitute the complete list of
15 documents, photographs and other things that you
16 reviewed in arriving at your expert opinions in this
17 lawsuit?

18 A Yes.

19 Q And are all of those items, numbers 1
20 through 26, included in the four three-ring binders?

21 A Yes.

22 Q Where did you get the items that are marked
23 in your expert report that are marked as items number
24 23 and 24 being publications of the Federal Highway
25 Administration?

1 A They were forwarded to me by Mr. Solymosi.

2 Q And I also note at the bottom of page 6 of
3 your expert report under a heading "What Should Have
4 Been Done," a reference to a project from the
5 Pennsylvania Transportation Institute by Elefteriadou,
6 as best as I can pronounce it,
7 E-l-e-f-t-e-r-i-a-d-o-u, et al; do you see that?

8 A Yes.

9 Q I don't see that project or that report
10 listed under the documents in your expert report items
11 1 through 26.

12 A I believe that report came from the, was
13 included with the group. And evidently I've
14 overlooked it or something, but -- no, these are the
15 depositions.

16 Q Well, take your time. Look through your
17 four three-ring binders and just tell me if you have
18 that study or report that you identify at the bottom
19 of page 6 of your expert report from the Pennsylvania
20 Transportation Institute.

21 A There is the U.S. Department of
22 Transportation.

23 Q What's the title of that document you are
24 looking at?

25 A This is "Synthesis of Shoulder Rumble

1 Strips."

2 Q That would be item 24 that you identify in
3 your expert report on page 3?

4 A Federal Highway Administration, synthesis
5 ethics and policies, yes.

6 Q Okay. What else do you have in the
7 three-ring binder? Or rather, I shouldn't ask you
8 that question. If you would, continue to try to
9 locate this Pennsylvania Transportation Institute
10 report.

11 A I remember that name that you pronounced
12 there. I remember that in here.

13 Q Just so we are clear on the record you have
14 just gone by another item --

15 A That's a "Synthesis of Shoulder Rumble
16 Strips Practices and Policies."

17 Q Right, that's item 24; correct?

18 A Yes.

19 Q What is the next item in that three-ring
20 binder?

21 A "Roadway Shoulder Rumble Strips."

22 Q That's item 23 on your list; correct?

23 A Yes.

24 Q Okay. If you continue to look through
25 there and see if you have this report by Elefteriadou

1 that you reference on page 6 as a basis for your
2 opinion.

3 A I remember seeing that fellow's name in
4 here. Here is his name right here in the study of
5 Elefteriadou, "the five proposed bicycle tolerable SRS
6 designs were evaluated by 25 intermediate and advanced
7 bicyclists."

8 Q What document are you referring to where
9 you find that name?

10 A This is the "Synthesis of Shoulder Rumble
11 Strip Practices and Policies."

12 Q I'm looking for a copy of his report, not
13 what somebody else said his report states. If you
14 have it.

15 A Seems to me that -- that is here someplace.
16 It had, it had a photograph of --

17 MR. SOLYMOSI: Roger, what was your
18 question? I can't recall what the question was.

19 MR. TAFT: I'm asking him if he has a copy
20 of the Pennsylvania Transportation Institute
21 report by Elefteriadou that he referenced and
22 relied upon at the bottom of page 6 of his
23 report.

24 MR. SOLYMOSI: His report says --

25 MR. TAFT: I know what it says.

1 MR. SOLYMOSI: It doesn't say he relied on
2 it. The says 2006 Pennsylvania Transportation
3 Institute relied upon a project by that person.

4 MR. TAFT: Right, he references that report
5 as a basis for his conclusion. I'm asking him if
6 he has a copy of that report by the Pennsylvania
7 Transportation Institute.

8 MR. SOLYMOSI: I don't believe he
9 references that report. He references that
10 document which "Shoulder Strip Rumble Strip"
11 document that's been identified. And inside that
12 document he will Elefteriadou is referenced. He
13 never referenced a report by Elefteriadou.

14 MR. TAFT: The question is very simple,
15 does he have a copy of the report from the
16 Pennsylvania Transportation Institute that he
17 cites at the bottom of page 6?

18 A I can visualize that report. I just can't
19 -- because it has a report of the Norfolk Southern,
20 Conrail and CSX engines on the front of the report.

21 Q Are you saying, Mr. Westphal, that that
22 Pennsylvania Transportation Institute report by
23 Elefteriadou involved railroads?

24 A No, maybe I'm confused a little bit.

25 Q If it didn't involve railroads, you

1 wouldn't expect to see locomotive engines on the
2 front; correct?

3 A Well, there was a report. So maybe I'm
4 confused about that. Evidently I don't have the
5 study.

6 Q Well, that's what I'm asking.

7 A Unless I just took it here, from this study
8 I took it out of here, I believe.

9 Q Okay.

10 A He quotes it in here in the study of
11 Elefteriadou or whatever his name is.

12 Q Okay. Well, that's what I'm trying to get
13 at.

14 A Yeah.

15 Q So to be clear, you do not have and have
16 never reviewed the original report from the
17 Pennsylvania Transportation Institute involving this
18 project by Elefteriadou? You have made reference to
19 what someone else said the report contained?

20 A Well, what I said in my report, the Federal
21 Highway Administration has assembled data of this
22 nature, which includes the testing of bicyclists who
23 travel on highways, et cetera, in 2000, and that's
24 what, in 2000 the Pennsylvania Transit Authority
25 relied upon the project of this man, to develop new

1 rumble strips configurations to decrease the level of
2 vibration experienced by bicyclists. And that's where
3 I got it out of here.

4 Q Okay. So just to be clear, you have never
5 seen or reviewed the report itself from the
6 Pennsylvania Transportation Institute, you merely have
7 referred to what someone else stated the report
8 contains?

9 A I referred to what was included in the
10 Department of Transportation information assembled.

11 Q Right.

12 A That included that material.

13 Q A blurb, a summary of that report?

14 A Yes, is what I read, what I read to you.
15 And it goes on to the next page, if you want me to
16 read that.

17 Q No, I don't want you to read it.

18 A Okay.

19 Q But what I do want you to admit, if it's
20 true --

21 A That's where I got this information.

22 Q -- you have never seen that man's report
23 yourself?

24 A No. I got this information from the DOT
25 report.

1 Q Okay. Thank you. Would you agree with me,
2 Mr. Westphal, that in order to give a valid expert
3 opinion, it's necessary to have complete, have a
4 complete and accurate understanding of the relevant
5 facts of the case?

6 A Yes.

7 Q And in your --

8 A And that's what I do, based on my broad
9 experience in the railroad industry, the material that
10 I've had, while I don't claim to be an expert in
11 certain things because I'm an expert in railroad
12 operations and I claim to be, my background and I've
13 been supported in that. But I do claim to have
14 expertise in many areas of, because of my experience
15 and you can only get that expertise by having that
16 experience.

17 Q I wasn't asking you a question about your
18 expertise.

19 A I understand.

20 Q I was asking you a question was it
21 necessary to have a complete and accurate
22 understanding of the relevant facts to give a valid
23 opinion?

24 A And I believe I answered that question.

25 Q Okay. And in your expert report beginning

1 at page 3, you set forth in writing what you consider
2 to be an accurate statement of relevant facts to
3 support your expert opinion; correct?

4 A That's correct.

5 Q I want to refer you to the first paragraph.
6 You are describing, are you not, the train that was
7 involved in the April 27, 1997 accident with Robin
8 Nixon --

9 A Yes.

10 Q -- is that right? And you are indicating
11 that that was an eastbound Norfolk Southern train?

12 A That's correct.

13 Q And then you go on to describe the train
14 and you state that "The train consist was 150 loads,
15 zero empties with 7,225 tons traveling at a reported 8
16 miles per hour"; correct?

17 A That's correct.

18 Q Now, in order to get that fact upon which
19 you are basing your opinion, I assume you reviewed the
20 train consist?

21 A I reviewed the information that was given
22 by the depositions of the engineer and the conductor
23 who are responsible for maintaining those records.

24 Q Well, did you review the train consist?

25 A The train consist wouldn't give me that.

1 That would give you what -- the train consist only
2 says what is in the cars or things like that and what
3 is their destination.

4 Q You don't think the train consist tells you
5 the number of cars and loads?

6 A The consist is the -- well, I guess you
7 could say yes. The consist of the train is so many
8 loads or empties.

9 Q Does the consist give you the weight of the
10 train?

11 A Yes.

12 Q Does the consist give you the length of the
13 train?

14 A Yes, it's on the wheel report.

15 Q Does the consist give you that?

16 A It's on the wheel report. Maybe we got a
17 different interpretation of consist.

18 Q Well, you have been involved in railroad
19 operations for many years and the concept of a consist
20 is pretty simple. A consist, as I understand it, you
21 correct me if I'm wrong, is the document that
22 identifies the makeup of a particular train; correct?

23 A Yes.

24 Q And isn't it a fact that you reviewed the
25 consist of this train in order to come out with your

1 statement that the train consisted of 150 loads, zero
2 empties and 7,225 tons?

3 A That information was in the, in the
4 deposition questions asked and answered in the
5 engineer's --

6 Q Show me.

7 A I don't mean to argue with you.

8 Q I'm not arguing, but it's a simple
9 question.

10 MR. SOLYMOSI: He has answered it, Roger.
11 He has told you he got it out of the deposition.

12 MR. TAFT: Okay. I'm asking him to show me
13 who said that, that he cites as a fact for a
14 basis of his opinion.

15 A There he says on page 12 --

16 Q Who is he? I'm asking where you got your
17 fact that "the train consist was 150 loads, zero
18 empties and 7,225 tons"?

19 A I believe I got it out of the information
20 that was furnished in one of these other statements.

21 Q When you say "other statements," do you
22 mean depositions or something else? It was not in a
23 deposition; correct?

24 A No, not in that one.

25 Q Whose were you reviewing?

1 A The conductor.

2 Q That would be Mr. Glenn, Robert Glenn?

3 A Yeah, Robert Glenn.

4 Q Okay, go ahead.

5 A I believe it was in some of the material
6 that was furnished by yourself. I just have to go
7 through here and find it.

8 Q Okay.

9 A Yes, here it is. It's on the form 6644
10 from the carrier.

11 Q What is that?

12 A It shows the number, the three units, 150
13 loads, no empties, 7,225 tons.

14 Q Can I see that, please? Did you ask for,
15 Mr. Westphal, a copy of the train consist itself to
16 review to determine the tonnage and length of the
17 train?

18 A No, this is a report here that tells you
19 the information.

20 Q Does it give you information on the length
21 of the train?

22 A Only that it's 150 loads?

23 (THEREUPON, Westphal Deposition Exhibit 9
24 was marked for identification.)

25 Q Let me show you what's been marked as

1 Westphal Deposition Exhibit 9. Have you seen that
2 document before?

3 A No, it's a wheel report is what it is,
4 train consist.

5 Q All right. When you make reference to a
6 wheel report, that's a different way of referring to
7 the train consist?

8 A Well, in railroad terminology, railroad
9 language, train consist is how many loads, how many
10 empties. The wheel report indicates how many, what is
11 the consist of the train, what is the, what is the
12 loads, what is contained in the cars, where do they
13 set off, where were they picked up, is there any
14 hazardous material in the car. That's what a wheel
15 report does.

16 Q So Westphal Deposition Exhibit 9 is a copy
17 of what you refer to as the wheel report --

18 A Yes.

19 Q -- for the train involved in the April 27,
20 1997 accident?

21 A Yes.

22 Q Did you request a copy of that to review
23 prior to providing your expert report?

24 A No.

25 Q Is this wheel report a document that is

1 generated and published on the day in which the train
2 operates with the number of cars identified on the
3 wheel report?

4 A In today's technology with computers and
5 e-mails and transmissions, it's been my experience in
6 talking to railroad conductors that they might get the
7 wheel report when they start, they might get just a
8 list of the hazardous material cars. Sometimes it's
9 generated as they go along and they pick it up. But
10 they do get the loads and empties and the tonnage of
11 the train when they leave their terminal. It's
12 important to the engineer.

13 Q Would you agree with me that this wheel
14 report is the most accurate report of what the train
15 consists of car by car, weight wise, number of cars
16 and length of train?

17 A That's the purpose of the report, yes.

18 Q If you refer now to this wheel report or
19 what I was referring to as a consist, it refers, does
20 it not, to 153 cars, comprised of three engines and
21 150, what appear to be coal cars? Do you understand
22 my question?

23 A Not really.

24 MR. TAFT: Read it back and I'll repeat it
25 if you don't.

1 (Read back.)

2 A I understand your question, but that isn't
3 what the wheel report says.

4 Q Well, let me point something out to you.
5 Does it not say 153 cars?

6 A Yes.

7 Q Does it not identify three engines?

8 A Yes.

9 Q And does it not then identify 150 separate
10 cars in addition to the three engines making up the
11 total of 153?

12 A Well, that isn't the way -- that isn't the
13 way -- in railroad -- I'm not arguing with you, but in
14 railroad terminology, that's not the way it's
15 expressed and railroad people don't do that. There
16 was 153 cars. That's 153 loads of coal and then there
17 are three engines.

18 Q This is Norfolk Southern's document, is it
19 not?

20 A I know it.

21 Q And correct me if I'm wrong, but you
22 haven't worked on a railroad or for a railroad since
23 you left the Chicago and Northwestern Railway Company
24 in December of 1960; correct?

25 A Yes, but I've still been involved in the

1 industry widely in that area during that period of
2 time.

3 Q You have never worked for Norfolk Southern?

4 A No.

5 Q Take a look at its business record and its
6 report, does it not show three engines and 150 coal
7 cars by number?

8 A The report shows 153 loads of coal. If you
9 look at the last page, the last car is 153, right
10 there. The total, the three engines are separated
11 from the total consist.

12 Q You show me car by car where you have 153
13 loads of coal.

14 A Mr. Taft, all I'm going by is they are
15 numbered --

16 MR. SOLYMOSI: You are being argumentative.
17 He has answered your question. He may not have
18 answered it the way you wanted him to --

19 MR. TAFT: I'm not getting argumentative --

20 MR. SOLYMOSI: -- but it is argumentative.

21 MR. TAFT: It may be argumentative, because
22 he is not reading the report.

23 A I'll read the report, Mr. Taft. The first
24 car --

25 Q You don't have to --

1 A The first car --

2 Q You don't have to read it out loud. Read
3 it to yourself and tell me if it does not identify,
4 car by car, 150 coal cars and three engines added
5 together which make up 153?

6 A It does not.

7 Q Then let's both look at it.

8 A All right.

9 Q Does it identify three engines on the first
10 page?

11 A Yes.

12 Q Does it identify 19 coal cars on the first
13 page?

14 A Starting with number one?

15 Q Yes.

16 A All right.

17 Q Let's go to page 2.

18 A There is 19 on the first page. On page 2--

19 Q Cars 20 through 51, correct, excuse me, 52?

20 A Mine only goes to 51.

21 Q Well, it's cut off at the bottom. Next
22 page goes cars 53 through 85.

23 A Mine only goes to 54. Well, I guess the
24 numbers are not there.

25 Q Well, you can see that there is something

1 at the top, can you not, Mr. Westphal?

2 A Yes.

3 Q And you can see there is something at the
4 bottom that's been cut off?

5 A Yes.

6 Q Let's go to the next page. Does it not
7 begin with number 86?

8 A Yes.

9 Q End with 118?

10 A Yes.

11 Q Let's go to the next page. Begins with 119
12 and ends with 150?

13 A Yes.

14 Q Does it identify any additional coal cars
15 beyond that 150?

16 A Yes.

17 Q Three more?

18 A Three more, which is 153.

19 Q So you have three engines?

20 A No.

21 Q You have three engines and 153 coal cars?

22 A No -- you have 153 cars, yeah, that's what
23 I said before and three engines.

24 Q Okay. All right.

25 A That's what I said before. You didn't put

1 it that way.

2 Q I apologize.

3 A Okay.

4 Q I apologize. Now, does it also indicate
5 the gross tons?

6 A Yes.

7 Q 19,376?

8 A Yes.

9 Q That's not what's in your report. You have
10 got 7,225 tons.

11 A Well, then I stand in error.

12 Q The consist does indicate 19,376 tons;
13 correct?

14 A Yes.

15 Q Does the consist also tell us that the
16 train is 7,818 feet in length?

17 A Yes.

18 Q And you would agree with me that 7,818 feet
19 is just about one and a half miles long?

20 A Yes. I mark report -- I stand corrected on
21 that.

22 Q Let's move on to the bottom of that page.

23 A Of --

24 Q I'm sorry, of your expert report, page 3.

25 You identify the conductor as Robert Glenn; correct?

1 A Yes.

2 Q And you identify the engineer as Timothy
3 Price?

4 A Are you on the bottom of the page now?

5 Q Second paragraph of your facts. Is that
6 who you identify as making up the train crew, namely
7 Robert Glenn as conductor and Timothy Price as
8 engineer?

9 A Yes.

10 Q And in the third paragraph you go on to say
11 that the conductor, and that's Mr. Glenn, "is to be
12 seated in the lead unit of the train, on a two man
13 crew, and be vigilant and alert to what is on the left
14 side of the train"?

15 A Yes.

16 Q Well, isn't it a fact that it was the
17 engineer, Mr. Price, who was operating this train on
18 the left side when this accident occurred, not
19 Mr. Glenn?

20 A Not to my knowledge.

21 Q So your knowledge is that Mr. Glenn, the
22 conductor, who was not operating the train, was seated
23 on the left side of this eastbound train?

24 A Yes.

25 Q Okay. Where did you get that information?

1 A The train, unless the train was backing up,
2 the engine would be going forward, and the conductor
3 would be sitting on the left-hand side of the engine.

4 Q We all agree, do we not, we had an
5 eastbound train --

6 A Yes.

7 Q -- that was moving?

8 A Yes.

9 Q And you are saying that based on the
10 materials you reviewed, you concluded that Mr. Glenn,
11 the conductor, was seated on the left side of the
12 train, which would be on the north side --

13 A Next to the lake.

14 Q -- on the lake side --

15 A Uh-huh.

16 Q -- is that right?

17 A Yes.

18 Q Where did you get that fact?

19 A Well, it's a fact in the industry that when
20 you have an eastbound train, unless that train is
21 backing up, why, the engineer would be on the
22 left-hand side of the locomotive, the engineer would
23 be on the right-hand side of the locomotive where the
24 controls are.

25 Q Well, isn't it a fact on this locomotive,

1 the controls were on the left side?

2 A I didn't get that from anything.

3 Q Well, didn't you read Mr. Glenn's
4 deposition?

5 A If I did, I didn't read that.

6 Q Okay, well, you have got identified as
7 Mr. Glenn's deposition as something you reviewed as a
8 basis for your report; correct?

9 A Yes.

10 Q Item 16. How carefully did you review his
11 deposition?

12 A Very carefully.

13 Q Did you review any of the deposition
14 exhibits that went with that deposition?

15 A If they were not with the exhibit, if the
16 exhibits were not included with the deposition, I
17 didn't read them.

18 Q Well, did you review any depositions that
19 accompanied the deposition transcripts that you
20 reviewed?

21 A Did I review any depositions that included
22 the deposition transcripts?

23 Q I'll start over again. You have
24 identified, and you have in front of you, some
25 deposition transcripts that you claim you reviewed

1 carefully; correct?

2 A Yes.

3 Q And some of those, including Mr. Glenn's
4 transcript, make reference to exhibits?

5 A Yes.

6 Q Do you have any deposition exhibits for
7 Mr. Glenn's deposition or for any other deposition?

8 A Unless they were, if they were not
9 forwarded to me, I don't have them.

10 Q Well, take a look and tell me if you have
11 any deposition exhibits for his deposition or any
12 other deposition?

13 A No, they were not in the one for Mr. Glenn.

14 Q How about the rest of them?

15 A They were not in the ones for Mr. Price.

16 Q Keep going. Check the rest of your
17 transcripts.

18 A They were not in the ones for Mr. Morgan,
19 or for Mr. Rockey, or for Mr. Frye, or for Mr. Baskin,
20 or for Mr. Cunningham. You are stating that there
21 were deposition exhibits for each one of them?

22 Q I'm trying to see if you received and
23 reviewed deposition exhibits for any of the
24 depositions that you claim you looked at carefully.

25 A Or for Mr. Stone, or for Mr. Pandlis. No,

1 the exhibits were not furnished.

2 Q As you read carefully those deposition
3 transcripts, you saw references to deposition
4 exhibits, did you not?

5 A It's in Mr. Robin Nixon there is about 36
6 exhibits.

7 Q How about the other ones?

8 A Let me look and see if we have an exhibit
9 in here.

10 Q Let's focus on Mr. Glenn. Are you
11 referring to Mr. Nixon's now?

12 A Well, this is Mr. Glenn.

13 Q What I'm saying is you reviewed carefully
14 Mr. Glenn's deposition transcript --

15 A Let's see what --

16 Q Didn't you see that there were deposition
17 exhibits that went with the transcripts?

18 A Yes, Exhibit No. 1 was marked for
19 identification.

20 Q Well, as you saw that there were deposition
21 exhibits that accompanied the transcript, did you make
22 a request to Mr. Solymosi that he give you those
23 exhibits so you had all the information to consider?

24 A I did not.

25 Q You didn't think it was important?

1 A No, because timetable number 1 is a
2 timetable. A timetable has little or nothing to do
3 with the accident as it happened. The book of rules
4 is the one that really --

5 Q So you decided certain deposition exhibits
6 were important and others weren't?

7 A No, I didn't say that.

8 Q You didn't think it was important enough to
9 ask for the deposition exhibits that Mr. Glenn
10 referred to in his deposition in order to get all the
11 information?

12 A If I thought it was, I would have asked for
13 them, yes.

14 Q And you didn't?

15 A No.

16 Q And you didn't ask for any deposition
17 exhibits?

18 A No.

19 Q So you didn't think any of the deposition
20 exhibits were important to your opinion?

21 A No, I didn't say that. I just didn't ask
22 for them.

23 Q Well, if you thought they were important
24 for them, would you have asked?

25 A What I read into the deposition about the

1 exhibit, the exhibit wouldn't mean really anything --

2 Q Well --

3 A -- to them.

4 Q Well, in Mr. Glenn's deposition, isn't it
5 true that Deposition Exhibit 4 was a diagram of the
6 locomotive that showed where he sat and where
7 Mr. Price sat and where the controls were?

8 A Well, I know what a diagram of a
9 locomotive, I know that, but --

10 Q Weren't you interested in knowing what this
11 locomotive was set up to do and where this train crew
12 was located? Wasn't that important to you?

13 A Yes.

14 Q Okay. Did you request a copy of Deposition
15 Exhibit 4 so you could see the diagram that Mr. Glenn
16 drew showing where he sat and where Mr. Price sat and
17 where the controls were?

18 A No.

19 Q Okay. Even though that was important?

20 A I don't see where the deposition -- oh,
21 Deposition Exhibit No. 1 was the engineer's report.

22 Q Well, let's go to page 32 of Mr. Glenn's
23 transcript. I assume you read that very carefully?

24 A I was in with Mr. Price.

25 Q Well, let's take a look at Mr. Glenn's.

1 A Page 22?

2 Q No, page 32.

3 A 32.

4 Q You read this transcript carefully;
5 correct?

6 A Yes, in my opinion I did.

7 Q What does Mr. Glenn testify to at question
8 beginning at line 14 as where the engineer was located
9 compared to him, the conductor?

10 A "He was on the north side. I was on the
11 south as far as sitting on the rail."

12 Q Okay.

13 A "There are two seats over here. I was
14 sitting over here and he is sitting there."

15 Q Now, Mr. Price was the engineer; correct?

16 A Yes.

17 Q And so Mr. Glenn was testifying that the
18 engineer was on the north side, the left side and
19 Mr. Glenn, the conductor, was on the right side, or
20 south side; correct?

21 A "He was on the north side. I was on the
22 south side as far as sitting on the rail."

23 Q Right.

24 A "There are two seats over here." Well, two
25 seats over here are on -- they are not on the

1 engineer's side. They are on the conductor's side.

2 Q Well, isn't it true that Mr. Glenn, the
3 conductor, was seated on the right side or south side
4 of the locomotive, not on the left side or north side
5 as you put in your report?

6 A The configuration of the locomotive, they
7 must have been backing up, because the -- I didn't see
8 anything where they had a dual control engine.

9 Q Well, you didn't ask to look at --

10 A I understand that.

11 Q -- Exhibit 4 which was the diagram?

12 A I understand that.

13 Q So you didn't --

14 A Did you see Exhibit 4?

15 Q Mr. Westphal, you are not to ask the
16 attorney the questions.

17 A I'm sorry.

18 Q You answer my questions. But you would
19 agree with me, would you not, that if you had reviewed
20 this transcript carefully, you would have seen that it
21 was the engineer on the left side, Mr. Price, and it
22 was the conductor, Mr. Glenn, on the right side, not
23 the way you have it. You have it backwards; is that
24 right?

25 A That's correct.

1 Q I'll show you because we made reference to
2 it because you didn't ask for it before, a copy of
3 Glenn Deposition Exhibit 4, which shows the controls
4 on the left side where the engineer was seated and it
5 shows the two seats on the right side where the
6 conductor, Mr. Glenn, was seated.

7 A That is an entirely different -- that is an
8 entirely different thing, an engine makeup that I've
9 ever seen in the industry.

10 Q Okay.

11 A And I would question that exhibit.

12 Q Well, you apparently didn't read his
13 testimony.

14 MR. SOLYMOSI: Is that a question?

15 MR. TAFT: No.

16 A Could I get a copy of that exhibit, please?

17 Q Sure. Make it for you after lunch or you
18 want it now?

19 A Any time.

20 Q Okay.

21 MR. SOLYMOSI: Are we going to take a
22 break, soon, Roger?

23 MR. TAFT: I'm sorry.

24 MR. SOLYMOSI: I need to eat.

25 MR. TAFT: Why don't we take a break now

1 and tell me when you would like to resume.

2 MR. SOLYMOSI: 1:00.

3 MR. TAFT: That's fine.

4 Q Mr. Westphal, I'll make a copy of that
5 exhibit for you.

6 A Okay, thank you.

7 (THEREUPON, at 11:50 a.m. a lunch recess
8 was taken. Resumed at 1:00 p.m.)

9 Q Back on the record. Prior to the lunch
10 break, we were reviewing parts of your expert report
11 in connection with your agreement that it is necessary
12 to have complete and accurate understanding of
13 relevant facts in order to give a valid opinion.

14 And let me refer you now to the bottom of
15 page 4 of your expert report. This is under the
16 heading "Discussion," last paragraph, you state in the
17 second sentence "In the instant accident to Robin
18 Nixon there were Norfolk Southern employees in
19 advantageous positions to note the presence of
20 children along the area of West 19th Street in Erie,
21 Pennsylvania. The use of crossing watchmen was in
22 place at three locations along West 19th Street and
23 one in particular in the vicinity accident to Robin
24 Nixon." That's what you said; correct?

25 A That's what it states.

1 Q But that's not true, is it, Mr. Westphal,
2 because when this accident happened there were no
3 crossing watchmen on duty?

4 A There were crossing watchmen on duty in
5 that area of the -- I didn't say at the time of the
6 accident, did I?

7 Q Well, you said "and one in particular in
8 the vicinity of the accident to Robin Nixon".

9 A Yes, in the vicinity of the accident which
10 would have been Sassafras.

11 Q You think there was --

12 A If we look --

13 Q You think there was a crossing watchman on
14 duty at Sassafras Street when this accident occurred?

15 A Well, we can look at the -- the crossing
16 watchmen were under the jurisdiction -- well,
17 that's --

18 Q First of all, Mr. Westphal, are you saying
19 that there were crossing watchmen assigned to
20 Sassafras Street?

21 A Maybe not -- there was crossing, I don't
22 want to get -- I'd have to look and see. But there
23 were crossing watchmen at different crossings along
24 that street.

25 Q So you don't think --

1 A Can I answer you?

2 Q Sure.

3 A For the purpose of guarding the crossing
4 for children that were going back and forth to school
5 and going across and when trains were going by.

6 Q It was on school days, during the school
7 year, during school hours; correct?

8 A Yes.

9 Q And in fact, that's what the PUC Order
10 said?

11 A Yes.

12 Q And you don't recall then whether one of
13 these three locations was Sassafras Street or not?

14 A I'd have to look and see. If you want to,
15 that's where the accident happened.

16 Q Right. But are you saying that there was a
17 crossing watchman on duty either at Sassafras Street
18 or someplace else when this accident occurred?

19 A No, no, I didn't say that. "In the instant
20 accident to Robin Nixon, there were Norfolk Southern
21 employees in advantageous positions to note the
22 presence of children along the area of West 19th
23 Street in Erie, Pennsylvania." That's what it says.

24 Q The instant accident was on September 27 --

25 A That's correct.

1 Q -- 1997; correct?

2 A Correct.

3 Q So are you saying that on that date there
4 were crossing watchmen in advantageous positions to
5 note the presence of children?

6 A No, what does it say there? "In the
7 instant accident to Robin Nixon, there were Norfolk
8 Southern employees in advantageous positions to note
9 the presence of children along the area of West 19th
10 Street in Erie, Pennsylvania. The use of crossing
11 watchmen was in place at three locations along West
12 19th Street." And I can go back --

13 Q Keep going.

14 A "And one in particular in the vicinity of
15 the accident to Robin Nixon." Now, in the vicinity,
16 that doesn't mean, could have been Myrtle Street where
17 they got --

18 Q Okay, but let me clarify something because
19 I have the wrong date. The instant accident to Robin
20 Nixon occurred on April 27th, 1997; correct?

21 A Yes.

22 Q And so are you saying whether it was a
23 Sassafras Street or Myrtle Street or some other
24 street, that in this instant accident on April 27th,
25 1997, there were Norfolk Southern employees working as

1 crossing watchmen, that day?

2 A I didn't say that day, no.

3 Q Okay.

4 A But I said there were crossing watchmen at
5 advantageous positions in the vicinity of the accident
6 which was at Sassafras. And those crossing watchmen
7 were in advantageous position to note children playing
8 along the tracks or being around the tracks or being
9 around trains if they were going by.

10 Q But if they were not working that day, they
11 would not have seen Robin Nixon?

12 A I didn't say that day --

13 Q Listen to me. As I interpreted your
14 statement to say that, when you say in the vicinity of
15 the accident to Robin Nixon. Maybe we have an
16 agreement here.

17 Would you agree with me that if there were
18 no crossing watchmen working on the day of the
19 accident, none of them would have seen Robin Nixon?
20 Would you agree with that?

21 A Well, I don't like to agree with, but if
22 there weren't any working, they wouldn't notice him.
23 You said, that's a redundant question.

24 Q Right, would you agree with that if they
25 were not working on the day of the accident, none of

1 them would have seen Robin Nixon?

2 A I am concerned with the fact that when they
3 were working, they would have been able to see
4 children around there and that's what they should have
5 reported.

6 Q Listen to my question. Would you agree
7 with me that if no crossing watchmen were working on
8 April 27, 1997, when this accident occurred, none of
9 them would have seen Robin Nixon? Can you agree with
10 that?

11 A That's a fact.

12 Q Okay. Second of all, as a fact, would you
13 agree with me that the accident on April 27, 1997
14 occurred on a Sunday?

15 A Well, we would have to look it up.

16 Q Well, let's take a look at the police
17 accident report. You reviewed that, did you not?

18 A Yes.

19 Q Because that's on your list. I'm talking
20 about the City of Erie Police accident report?

21 A Did the defendant furnish that?

22 Q I don't know.

23 A It says in the newspaper, Sunday's
24 accident.

25 Q You have a copy of the police accident

1 report in one of those three-ring binders; correct?

2 A Yes.

3 Q And you would agree with me that April
4 27th, 1997 was a Sunday?

5 A Yes, it said Sunday's accident.

6 Q And second of all, you would agree with me
7 that Sunday is not a school day?

8 A I would say so, yes.

9 Q So you would agree with me that none of
10 these crossing watchmen that you were referring to in
11 your report would have been on duty and would have
12 seen Robin Nixon on the day of the accident?

13 A They wouldn't have been on duty, no.

14 Q And they wouldn't have seen him on the day
15 of the accident?

16 A If they weren't on duty, they wouldn't have
17 seen him.

18 Q That's all I'm --

19 A My position on this is the crossing
20 watchmen that were there were negligent in not
21 informing the police or anybody else that there were
22 children around and try to deter that. They never
23 notified the dispatcher, they never notified any of
24 their superiors that there were children up and down
25 that street along the trains and getting on the

1 trains. One of them did, Mr. Rockey, he pointed that
2 out in his deposition.

3 Q How would that have prevented the accident
4 to Mr. Nixon on Sunday morning, April 27, 1997?

5 A If the Norfolk Southern Railroad would have
6 had reported to the police department and the police
7 department would have taken action to look out for
8 that, and the railroad would have done this over the
9 months, these kids wouldn't be playing out there.
10 There is many other things it's in my report --

11 Q I know, but you are suggesting then that if
12 Norfolk Southern had notified the City of Erie Police,
13 they would have stationed policemen somewhere along
14 19th Street on Sunday morning to make sure people like
15 Robin Nixon didn't do this?

16 A No, that's not the standard -- I'm talking
17 about the standard in the industry.

18 Q Well, you just said that if the City Police
19 were notified, they would have taken action to prevent
20 it?

21 A That would have been on many occasions,
22 Mr. Taft, that they could have done that on many
23 occasions, not just on that day. Many occasions. And
24 to deter them children from going there. You
25 shouldn't have to do it all the time.

1 Q I'm referring to the specific date of the
2 accident, Robin Nixon on a Sunday morning, okay, there
3 were no Norfolk Southern employees working that day as
4 crossing watchmen, you would agree with that, right?
5 Yes or no?

6 A Yes.

7 Q But you are saying that if in the past
8 there had been reports of this, the City of Erie
9 Police would have taken action to have prevented Robin
10 Nixon from grabbing onto that train on Sunday morning?

11 A Any children, not just Robert Nixon, all
12 the children.

13 Q What would they have done on Sunday morning
14 to have prevented Robin Nixon from grabbing onto that
15 train?

16 A If they weren't there, they couldn't have
17 done anything.

18 Q Right.

19 A But the reason they weren't there is
20 because Norfolk Southern never took any action to
21 notify the police in Erie, Pennsylvania, about it.

22 Q So if Norfolk Southern had notified the
23 City Police earlier, the police would have stationed
24 people at 19th Street in case Robin Nixon came along?

25 A No, you are trying to put words in -- the

1 standard in the industry is the same as what you
2 argued about the, you questioned me about the position
3 of the people on the locomotive. It doesn't make any
4 difference which side they were on. They were
5 negligent in not ever noticing children on there and
6 never looking sideways. They never told the
7 dispatcher about children playing along the tracks,
8 which is the standard in the industry.

9 Q And you think if that had happened --

10 A And then the dispatcher would have notified
11 the Police Department. And the Police Department
12 would have took action to go down there, at least
13 station a car down there and keep the kids away from
14 those tracks. That's the standard in the industry.

15 Q So you think the standard in the industry
16 is the City Police would have stationed a car or cars
17 along 19th Street indefinitely?

18 A No, you are taking it out of context. I
19 didn't say that

20 MR. SOLYMOSI: I'm going to object here.

21 You have to look at his report as a whole. You
22 are looking at one part of his report --

23 MR. TAFT: I'm trying --

24 MR. SOLYMOSI: -- and you are trying to
25 rope him into saying that he said that they

1 should have been stationed there. That's not
2 what his report says.

3 MR. TAFT: I don't understand his report,
4 and that's what I'm trying to get at.

5 MR. SOLYMOSI: That's your problem if you
6 don't understand it. It's clearly stated that he
7 is saying that these people that were alongside
8 the tracks never reported the accident.

9 MR. TAFT: Mr. Solymosi, don't speak for
10 the witness. This is cross examination of your
11 expert, and I'd appreciate if you want to object,
12 fine. But don't speak for your witness and coach
13 him.

14 THE DEPONENT: I don't believe I have to be
15 coached. I tried to get my point across to you
16 and tell you just exactly what the standard in the
17 industry is, that the train crews look out, they a
18 vigilant and they look out to see if anybody is ar
19 the train. If they see children around the train,
20 they are supposed to notify the dispatcher by radi
21 The dispatcher notifies the Police Department and
22 fact the railroad police. They take action. Whet
23 it's on Sunday, Monday, Tuesday or Wednesday, to
24 deter kids from doing that practice. And that
25 would have deterred a lot of the accidents that

1 would have happened. That's the standard in the
2 industry.

3 Q How do you know it would have deterred
4 Robin Nixon on Sunday morning, April 27, 1997?

5 A I didn't say that. I said it would deter
6 the accidents and the kids would have stayed away from
7 the tracks.

8 Q | Mr. Westphal, in your expert report you
9 make reference to a report by James Guarino having to
10 do with the installation of rumble strips and also the
11 installation of signs between the rails indicating
12 "DANGER-NO BIKES"; is that correct?

13 A Can you locate it in my report there?

14 Q Sure, page 7.

15 A Okay, I have that in front of me.

16 Q Okay. Good.

17 (THEREUPON, Westphal Deposition Exhibit 10
18 was marked for identification.)

19 A Now, Mr. Taft, did you take one sentence
20 out of context or are we going to look at the whole
21 thing now?

22 Q I don't think I took a sentence out of
23 context. I asked if you referenced in your report
24 this report of Mr. Guarino. I think you said "yes, I
25 did".

1 A What should have been done, that's on page
2 7, of 6, then continues on page 7.

3 Q Let me show you what's been marked as
4 Westphal Deposition Exhibit 10. Is that a copy of
5 Mr. Guarino's report dated February 12th, 2007 to
6 which you reference in your report?

7 A Yes.

8 Q And as part of your report you are adopting
9 Mr. Guarino's conclusions about installing rumble
10 strips in the fashion he proposes and also installing
11 these "DANGER-NO BIKE" signs in the fashion he
12 proposes?

13 A I concur in his recommendations to prevent
14 injuries to the people, kids along the 19th Street.

15 Q I want to ask you some questions now about
16 your opinions which begin on page 9.

17 A Are we finished with Exhibit 10?

18 Q Not necessarily, but I'm referring to page
19 9 of your report, referring to your opinions. If I
20 understand it, you have set forth a total of 14
21 opinions on pages 9 and 10?

22 A Yes.

23 Q And all those are based upon the facts as
24 you understood them and the other materials and
25 documents referenced in your expert report?

1 A Yes.

2 Q Including the report of Mr. Guarino dated
3 February 12th, 2007; correct?

4 A Yes.

5 Q And I've got to follow up on these opinions
6 and in part on some of them I'm following up because I
7 believe you told me earlier that when you were
8 employed by Chicago and Northwestern Railway Company,
9 you never worked in the maintenance of weigh
10 department; correct?

11 A Not per se.

12 Q Well, you were assigned to freight and
13 passenger service, were you not?

14 A Yes.

15 Q You were not assigned to the maintenance of
16 weigh department to maintain track and ballast and
17 ties, were you?

18 A When you are a conductor on the railroad,
19 you have a responsibility when a car is derailed, then
20 you have to do maintenance of weigh work with a car to
21 set frogs on it, to get ballasts out of the way, to
22 put ties underneath it. It's all maintenance of weigh
23 work. If you don't have a maintenance of weigh person
24 there you have to do it, you have to do it, to rerail
25 a car.

1 Q How often did you have derailments?

2 A Well, one time we had one for five days in
3 a row. We never did get back to our home terminal.

4 Q You had maintenance of weigh show up before
5 the end of five days, didn't you?

6 A Yes, to rerail cars.

7 Q But derailments were not a very frequent
8 occurrence?

9 A When I first went to work on the railroad
10 1945, they were. We were on the ground more than we
11 were on the rail.

12 Q So you say there were more derailments in
13 1945 that kept you from running than there were good
14 rail that let you operate?

15 A On our Chicago Northwestern Railroad there
16 was in 1945.

17 Q So you had to do some temporary ballast
18 work on all these?

19 A Yes, if they didn't show up, we had to
20 rerail the car.

21 Q But as far as ongoing maintenance of track,
22 rail, ballast and the like, there was work assigned to
23 the maintenance of weigh department?

24 A That's their department.

25 Q And you never worked in that department?

1 A I never said I did.

2 Q I know. I know you didn't. Now, opinion
3 number 1, "Norfolk Southern Railroad was negligent in
4 failing to maintain the segment of railroad known as
5 the West 19th Street track in a manner to prevent
6 accidents which were known to occur."

7 What do you mean in that opinion that
8 Norfolk Southern Railroad was negligent in failing to
9 maintain the segment of railroad known as West 19th
10 Street track?

11 A The railroad did not provide any type of
12 signage. They didn't provide any personnel around the
13 track when -- to report or to accept reports for
14 children playing around the tracks. The crossing
15 watchmen never reported any of that, those children
16 sightings, to their officials so that any type of a
17 program could be established to prevent the children
18 from catching onto the trains or even being around
19 trains.

20 Q What does that have to do with maintaining
21 the segment of rail?

22 A Maintaining the segment of railroad, that's
23 what it's about, to keep it in operating condition
24 without injury to traffic or employees or public.

25 Q Okay. You are not referring then to

1 maintenance of the track or the ties per se?

2 A No, the track, the track and the ties are
3 underneath the cement or the asphalt.

4 Q I just want to make clear when you are
5 talking about failing to maintain a segment of track,
6 you are not talking about the type of work the
7 maintenance of weigh department does?

8 A No.

9 Q Okay. Is that the same for number 2,
10 number 2 says "Norfolk Southern Railroad was negligent
11 in the maintenance of West 19th Street track located
12 within a residential and industrial area." What do
13 you mean by that?

14 A That's correct, they didn't do anything to
15 try to prevent any type of accidents by having any
16 kind of a program to deter the children from playing
17 next to the tracks and where trains are moving along.

18 Q My understanding from your report is that
19 you and Mr. Guarino agree that what should have
20 happened was the installation of these rumble strips
21 and the painting of signs indicating "DANGER-NO BIKES"
22 between the rails; is that right?

23 A That's what could have been done. And
24 that's what was in my report what should have been
25 done.

1 Q Right. So when we are referring to items 1
2 and 2, that's what you are referring to?

3 A No, no, the railroad did absolutely
4 nothing, Mr. Taft.

5 Q Well, show me, in addition to telling me,
6 that the rumble strips should have been installed and
7 that the signs should have been put between the rails
8 stating "DANGER-NO BIKES," where in your report are
9 you telling me that something else should have been
10 done --

11 A Down on one of the --

12 Q -- to maintain the tracks?

13 A In number 13.

14 Q Are you on opinion 13?

15 A Yes.

16 Q I'm not there yet. I'm on 1 and 2.

17 A Well, we are jumping around here.

18 MR. SOLYMOSI: You just asked him to show
19 you elsewhere in the report.

20 MR. TAFT: Okay, 13 is installing the
21 rumble strips.

22 MR. SOLYMOSI: Install and maintain.

23 Q Right, we talked about those already.

24 A No, we haven't really talked about them
25 yet. We just mentioned them and you gave me that